No. 48381-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAY MERRILL, Appellant,

v.

PEMCO Mutual Insurance Company, Respondent

REPLY BRIEF OF APPELLANT

Stephen M. Hansen (WSBA #15642)
Law Office of Stephen M. Hansen, P.S.
1821 Dock Street, Suite 103
Tacoma, WA 98402
Telephone:(253) 302-5955
Facsimile:(253) 301-1147

Scott P. Nealey, *admitted pro hac vice*
Law Office of Scott P. Nealey
71 Stevenson, Suite 400
San Francisco, CA 94015
Telephone: (415) 231-5311
Facsimile: (415) 231-5313

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I. INTRODUCTION

PEMCO's arguments to this Court fail to acknowledge (or dispute) that both the Superior Court and PEMCO's counsel acknowledged that the defined term "Class List" (which was expressly defined as "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015") *was clear and unambiguous* and referred expressly to the figures on the March 15, 2015 list (App. Br. at 12-13). Further PEMCO fails to address the multiple cases from this Court and the Washington Supreme Court cited by Appellant which all hold there must *first* be an ambiguity for a provision to be construed. (App. Br. at 13-16). Since there was no ambiguity, the Superior Court committed plain error in modifying the contract at issue, and not enforcing it as written.

II. ARGUMENT

A. The Unambiguous Terms of ¶9 and 44 of The Settlement Agreement Required That $59,079,170.66 Be Used As The Denominator.

i. PEMCO Failed, And Still Fails To Identify Any Ambiguity In The Defined Term "Class List" Which Must Be Enforced As Written As To The Denominator.

As Plaintiff showed (App. Br. at 12-13) there was no confusion as PEMCO knew that the figure to be used as the "total repair costs" under ¶44 (CP115) was fixed by the express definition in ¶9 of the settlement agreement. Both the Superior Court and PEMCO's counsel acknowledged that the *express* definition provided in ¶9 of the Settlement for the "Class List" (that being, "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015") was unambiguous. To repeat from Appellants' Brief what PEMCO's counsel admitted, but now avoids discussing:

> THE COURT: I got it. So, Mr. Phillips [PEMCO's Counsel], don't we have a defined term, class, defendants will use the total amount of payments covered on the class list?
> MR. PHILLIPS: We do

RP17:7-11;

> THE COURT: Well, but Mr. Nealey [Class Counsel], as I understand it, says the denominator is defined and fixed by the settlement.
> MR. PHILLIPS: He says that, and it's true...

RP23:9-12. Paragraph 9 of the Settlement (CP108) reads: "'Class List' means the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015." This term was clear and unambiguous, and PEMCO advances no explanation for why the

actual words used by the Parties are unclear.

As the Appellants showed, *and PEMCO entirely ignored in its Response*, Washington law is crystal clear: there must *first* be an ambiguity for a Court to construe, let alone modify, a contract. (App. Br. at 13-14). As the Washington Supreme Court has held, *a holding which PEMCO ignores*, where the language of a contract is "clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists." *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988). "Ambiguity will not be read into a contract where it can be reasonably avoided." *Hearst Communications v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).[1]

Ignoring the entire lack of ambiguity in which "Class List" was to be used for the *denominator*, PEMCO simply cites *Berg v. Hudesman*, 155 Wn.2d 657, 666-67, 801 P.2d 222 (1990) (Res. Br. at 19) and argues this Court may look at evidence to vary the clear

[1] PEMCO entirely ignores *all* of the cases Plaintiff cited showing what is required to find an ambiguity, these included: *Mayer v. Pierce County Medical Bur., Ind*, 80 Wn.App. 416, 909 P.2d 1323, 1326 (Div. 2 1995)(" A contract term is only ambiguous "when its terms are uncertain or when its terms are capable of being understood as having more than one meaning."); *Washington Public Utility District' Utility System v. PUD 1 of Clallam Cty.*, 112 Wn.2d 1, 11, 771 P.2d 70 (1989)(finding of ambiguity requires that "the *language on its face* is fairly susceptible to two different but reasonable interpretations"; *italics* in original)

defined term "Class List." This is clearly incorrect. As the Supreme Court stated in *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 697, 974 P.2d 836 (1999), summarizing the *Berg* Rule:

> admissible extrinsic evidence does not include:
>
> • Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
>
> • Evidence that would show an intention independent of the instrument; or
>
> • Evidence that would vary, contradict or modify the written word.

Id. at 697 (bullet points in original; underlining added). What PEMCO now argues for, and what the Superior Court did below, is to ignore the clear and unambiguous terms of the Settlement Agreement, and "modify the written word" by substituting a later October 2, 2015 list for the March 31, 2015 list the settlement agreement both contemplates and requires. Neither *Berg*, nor any other authority in Washington, allows this, and this Court need not go further to overturn the Superior Court's erroneous decision.

ii. Later Additions The Class List, And Inclusion In The Settlement Of Those Added, Was Contemplated By The Parties, And Does Not Change The *Denominator*, Nor Create Ambiguity.

Rather than arguing that the defined term "Class List" was

ambiguous as to the *denominator*, PEMCO argues that the parties contemplated adding additional class members via a later list, and citing to a *single* case, *Holter v. National Union Fire Ins. Co. of Pittsburgh, Pa,* 1 Wn.App. 46, 50, 459 P.2d 61 (1969) arguing that if more Class Members are added, the settlement formula requires the use of the *denominator* on the *latter* list, not the one expressly called for by the parties agreement. Res. Br. at 13.

To be clear, both parties agree that in drafting the agreement, everyone contemplated that the list would be supplemented after the "March 31, 2015 Class List" defined by Paragraph 9 was prepared, and these individuals would be entitled to participate in the settlement. Appellants made this very point in their Opening Brief at 4, 8-10, 15-16. Moreover, there is no dispute that the later October 2, 2015 list (which the Superior Court held would be used for the denominator) was unilaterally created by PEMCO and was only provided well after final approval was granted, while the March 31, 2015 list was presented at the time the Settlement was signed. *Id.* at 7-8.

However, taking the individual repair costs from the later October 2, 2015 list for the settlement formula's *numerator* for the addition 1395 claims PEMCO "found" after the March 31, 2015

Class List was provided,[2] does not require that the *denominator* be taken as well. While PEMCO argues that this is the holding of *Holter*, *Holter's* holding is actually directly to the contrary. *Holter* involved a defined term "insured." *Id.* at 48. The question was not if this defined term could be changed or modified (what PEMCO argues for, and the Superior Court below ordered) but whether it had to have the same meaning throughout the policy. The *Holter* Court reasoned that it did not always need the same meeting:

> in the absence of anything in the context of a contract clearly indicating a contrary intent, when the same word is used in different parts of the contract it will be presumed to be used in the same sense throughout the contract. Where its meaning in one instance is clear, that meaning will be attached to it in other parts of the contract.

Id. at 50 (underlining added). In *Holter*, because "the term 'insured' was defined with particularity" *and there was no indication that the intent was anything different in the exclusionary language at issue*, the Court applied the definition of "insured" as written. *Id.* In the instant case, the "total repair costs" (the *denominator*) under ¶44 (CP115) - was fixed by the express definitions of the settlement agreement. in ¶9 of the Settlement for

[2] The individual repair costs for the earlier claims were, of course, on the March 31, 2015 "Class List", and were not somehow missing or unclear.

the "Class List" as coming from the March 31, 2015 "Class List" and it was required to be applied as written, and it was plain error to disregard the party's agreement and to not apply it.

Moreover, the second question, what number would be used for the *numerator* under ¶44 (CP115) for the 1395 Claims PEMCO found, and included on the supplemental October 2, 2015 list, was also clear: as both PEMCO and Appellants admitted, those claims were to be included in the distribution. Since the individual repair costs *for these new claims* could not have been included on the March 31, 2015 "Class List" it could be, and in fact has been, taken from the later list. This does not require either logically, or legally, rewriting the parties' agreement to change the clearly defined term "Class List" in the *denominator* as PEMCO argues. Instead, it simply requires pulling what the parties clearly intended would be the numerator for any addition claims PEMCO found from the later list, and this case easily fits into the underlined qualifier in *Holter*.[3]

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[3] Put another way, what is the *denominator* is clear and presents no ambiguity, and where the "individual repair cost" [the numerator] is to be found is also clear; it is taken off the March 31, 2015 "Class List" for those claims on that list, and is taken from the supplemental October 2, 2015 list for those new claims. While PEMCO cites *Seattle-First Nat. Bank v. Westlake Park Assoc.*, 42 Wn.App. 269, 275, 711 P.2d 361 (1985) that case's holding that "An interpretation which gives effect to all of the words in a contract provision is favored over one that renders some of the language meaningless or ineffective"

iii. The Contract As Written Was Not "Mathematically Absurd" And Did Not Need Rewriting.

PEMCO finally cites several cases which hold that if ambiguity exists, and a proposed construction is "mathematically absurd", it should not be adopted. Res. Br. at 15-17. However, the argument PEMCO makes is inapplicable to this case. Although PEMCO attempts to avoid its own admissions below, both the Parties, and the Superior Court, were well aware that this was a claims made settlement *where the claims rate would be well under 100%* and that not all of the funds would be claimed. App. Br. at 2 (citing RP20:14-16, 31:14-22). In fact, only 42.34% of those who received notice filed claims. *Id.* As such, there was simply no issue with the settlement formula, when applying the unambiguous term "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015" in ¶9, resulting in "mathematically absurd" results.

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actually undercuts PEMCO's argument. PEMCO proposes a construction of the words "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015" in ¶9 *which gives no effect to the actual words*, and instead changes the definition to in essence read ""the revised class notice list furnished to Class Counsel by the Defendants on October 2, 2015." This shows that PEMCO's interpretation is improper

It is in fact PEMCO's entire argument that is absurd. PEMCO, in essence, argues that if its lawyers can come up with a hypothetical, that both parties admit will not happen, *and did not happen*, that would result in an a "mathematically absurd" result, a Court is free to rewrite the parties' agreement. No case so holds, and not surprisingly the parties' contract, and draft agreements reflect, what they know or expect will happen, and not hypothetical situations that they know will not occur PEMCO's argument, in essence, that hypothetical arguments, not presented in the case before the Court, create an ambiguity is clearly not the law, nor would it be a reasonable rule to adopt as it would create uncertainty in nearly every contract.

Not surprisingly, Washington Courts have rejected the type of hypothetical argument PEMCO made to the Court below, and now repeats to this Court. *Cook v. Evanson*, 83 Wn. App. 149, 920 P. 2d 1223, 1227 (1996)("we decline to find an ambiguity based on the clause's application to hypothetical cases"); *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn. 2d 713, 952 P. 2d 157, 162 n.5 (1998)("Because we are able to answer the precise question ...without deciding whether the phrase "lives with" encompasses other factual situations, we decline to address hypothetical cases

involving stays of lesser duration."); *cf. Western Telepage, Inc. v. City of Tacoma*, 998 P. 2d 884, 890 140 Wn. 2d 599 (2000)(construing statute; "we are not obliged to discern an ambiguity by imagining a variety of alternative interpretations").

B. The Superior Court's Order Prejudiced Insureds, Requiring Reversal.

It is undisputed by PEMCO that the Superior Court's redrafting of the parties' settlement agreement so as to remove the expressly defined term "the revised class notice list furnished to Class Counsel by the Defendants on March 31, 2015" in ¶9 and, instead, using the Total Repair Cost figure from the later October 2, 2015 list as the *denominator* resulted in payments to Class Members making claims being *on average* $50.77 less. CP 195. This took from each Class Member what was negotiated on their behalf, saving PEMCO what it did not have to pay. As such, this Court should reverse the Superior Court's Order and order that Insureds be paid under the Settlement Agreement the *difference* in what the Settlement provided, using the figure for "Total Repair Cost" on the "3/31/15 Class List" and the lesser amount they already received.

III. CONCLUSION

For the foregoing reasons this Court should REVERSE and remand for payment of the amounts required by the plain and unambiguous terms of the parties' Settlement Agreement.

RESPECTFULLY SUBMITTED this 6th day of June, 2016.

Law Offices of STEPHEN M. HANSEN, PS

STEPHEN M. HANSEN, WSBA #15642
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 6th day of June, 2016, I

[X] e-mailed [X] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to:

John W. Phillips
Attorney at Law
Phillips Law Group, PLLC
315 Fifth Avenue South, Ste 1000
Seattle, WA 98104-2682
jphillips@jphillipslaw.com

Timothy Parker
Jason W. Anderson
Lydia A. Zakhari
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle WA 98101-7010
parker@carneylaw.com
anderson@carneylaw.com
zakhari@carneylaw.com

DATED this 6th day of June, 2016, at Tacoma, Washington.

ROSLYN N. ROBBINS, Legal Assistant